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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Josef Timothy Dixon,

10 Petitioner,

11 v.

12 Ryan Thornell, et al.,

13 Respondents.
14

No. CV-23-00339-PHX-DWL

ORDER

15 On February 16, 2023, Petitioner signed and mailed a petition for a writ of habeas
16 corpus under 28 U.S.C. § 2254. (Doc. 1 at 11.) The petition was docketed on February
17 24, 2023. (Doc. 1.) On July 21, 2023, Magistrate Judge Metcalf issued a report and
18 recommendation (“R&R”) concluding that the petition was untimely filed and should
19 therefore be dismissed with prejudice. (Doc. 12.) Afterward, Petitioner filed objections to
20 the R&R (Doc. 13) and Respondents filed a response (Doc. 14).

21 As explained below, the Court agrees with the R&R’s conclusion that the petition
22 was untimely filed. Accordingly, Petitioner’s objections are overruled, the R&R is
23 affirmed, and this action is terminated.

24 **RELEVANT BACKGROUND**

25 In November 2017, Petitioner was charged in Maricopa County Superior Court with
26 16 counts of child sex trafficking and two drug-related crimes. (Doc. 12 at 1-2.) Petitioner
27 was convicted at trial on most of the counts and sentenced to a total of 190 years in prison.
28 (*Id.* at 2.)

1 On May 26, 2020, the Arizona Court of Appeals issued a memorandum decision
2 affirming Petitioner's convictions and sentences. (*Id.*)

3 On December 11, 2020, the Arizona Supreme Court denied Petitioner's petition for
4 review. (*Id.*)

5 On January 12, 2021, Petitioner filed a timely notice of post-conviction relief
6 ("PCR"). (*Id.*) Petitioner did not seek appointment of counsel and eventually filed a *pro*
7 *se* amended PCR petition. (*Id.* at 2-3.)

8 On January 14, 2022, the trial court dismissed the amended PCR petition without a
9 hearing. (Doc. 9-1 at 296.)¹

10 On February 15, 2022, Petitioner filed a conclusory "Motion for Rehearing" dated
11 February 9, 2022 and asserted that it was sent "via US Mail." (Doc. 12 at 3.)

12 On March 16, 2022, the trial court summarily dismissed the motion for rehearing.
13 (*Id.*)

14 As noted, on February 16, 2023, Petitioner signed and mailed his habeas petition in
15 this action. (Doc. 1 at 11.) The Court previously explained that the petition raises four
16 grounds for relief: (1) ineffective assistance of trial and appellate counsel; (2) violation of
17 Petitioner's Sixth Amendment right to a fair and speedy trial; (3) denial of due process;
18 and (4) illegal sentence. (Doc. 5.)

19 On July 21, 2023, Judge Metcalf issued the R&R. (Doc. 12.) The R&R concludes
20 that the petition must be dismissed because it was filed outside AEPDA's one-year
21 limitations period. More specifically, the R&R begins by explaining that Petitioner's
22 conviction became "final" for AEPDA purposes on March 11, 2021, which is 90 days after
23 the Arizona Supreme Court denied Petitioner's petition for review. (*Id.* at 4-5.) However,
24 the R&R also notes that Petitioner is entitled to statutory tolling under 28 U.S.C.
25 § 2244(d)(2) during the period in which his application for state post-conviction relief
26 remained pending. (*Id.* at 5.) The R&R concludes that because Petitioner timely initiated

27 ¹ The R&R states that the order dismissing the amended PCR petition was entered on
28 January 12, 2022. (Doc. 12 at 3.) However, Respondents correctly note that although the
minute order is dated January 12, 2022, it was not entered and filed on the docket until
January 14, 2022. (Doc. 14 at 6, citing Doc. 9-1 at 296.)

1 his PCR proceeding no later than January 12, 2021, which was before his conviction
2 became final, Petitioner is entitled to statutory tolling here. (*Id.*)

3 As for the extent of statutory tolling, the R&R states that Petitioner's PCR
4 proceeding "remained pending at least through January 12, 2022, when it was dismissed
5 by the PCR court" and that the period of statutory tolling must be further extended in light
6 of the principle that "[a] post-conviction application remains pending until the expiration
7 of time allowed to seek further review, even if such review is not sought. (*Id.*, citing
8 *Melville v. Shinn*, 68 F.4th 1154 (9th Cir. 2023)). The R&R states that, under Arizona law,
9 Petitioner had 30 days to seek rehearing or further review, so his PCR proceeding remained
10 pending—at least for statutory tolling purposes—through February 11, 2022. (*Id.*)

11 The R&R acknowledges that if Petitioner had filed a *timely* motion for rehearing or
12 petition for review, the period of statutory tolling would have been further extended until
13 that motion/petition was resolved. (*Id.* at 5-6.) However, the R&R concludes that
14 Petitioner cannot take advantage of that principle here because the motion for rehearing he
15 filed with the PCR court, which he submitted on February 9, 2022, was untimely, as
16 Arizona Rule of Criminal Procedure 32.14(a) creates a 15-day deadline for filing a motion
17 for rehearing and that deadline expired in Petitioner's case on January 27, 2022 (*i.e.*, 15
18 days after the trial court denied his PCR petition on January 12, 2022). (*Id.* at 5-6 & n.5.)
19 The R&R further explains that although "the PCR court did not address the timeliness of
20 Petitioner's Motion for Reconsideration, but rather appears to have addressed the merits,"
21 "in the absence of a clear indication by the state courts that a particular request for review
22 was timely or untimely, the habeas court must itself determine what the state courts would
23 have held in respect to timeliness." (*Id.* at 6, citing *Evans v. Chavis*, 546 U.S. 189 (2006)).

24 Given this backdrop, the R&R concludes that AEPDA's one-year limitations period
25 began running on February 11, 2022 and expired on February 11, 2023; that the earliest
26 possible filing date of the petition in this case, assuming Petitioner is entitled to
27 consideration under the mailbox rule, is February 16, 2023; and thus "Petitioner's Petition
28 was five days delinquent." (*Id.* at 7.) Finally, the R&R also concludes that Petitioner is

1 not entitled to equitable tolling or relief pursuant to the “actual innocence” gateway. (*Id.*
2 at 7-8.)

3 **LEGAL STANDARD**

4 A party may file written objections to an R&R within 14 days of being served with
5 a copy of it. Rules Governing Section 2254 Cases 8(b) (“Section 2254 Rules”). Those
6 objections must be “specific.” *See* Fed. R. Civ. P. 72(b)(2) (“Within 14 days after being
7 served with a copy of the recommended disposition, a party may serve and file specific
8 written objections to the proposed findings and recommendations.”).

9 “The district judge must determine de novo any part of the magistrate judge’s
10 disposition that has been properly objected to. The district judge may accept, reject, or
11 modify the recommended disposition; receive further evidence; or return the matter to the
12 magistrate judge with instructions.” *See* Fed. R. Civ. P. 72(b)(3). “In providing for a de
13 novo determination . . . Congress intended to permit whatever reliance a district judge, in
14 the exercise of sound judicial discretion, chose to place on a magistrate’s proposed findings
15 and recommendations. . . . [D]istrict courts conduct proper de novo review where they
16 state they have done so, even if the order fails to specifically address a party’s objections.”
17 *United States v. Ramos*, 65 F.4th 427, 433 (9th Cir. 2023) (citations and internal quotation
18 marks omitted). *See also id.* at 434 (“[T]he district court ha[s] no obligation to provide
19 individualized analysis of each objection.”).

20 Additionally, district courts are not required to review any portion of an R&R to
21 which no specific objection has been made. *See, e.g., Thomas v. Arn*, 474 U.S. 140, 149-
22 50 (1985) (“It does not appear that Congress intended to require district court review of a
23 magistrate’s factual or legal conclusions, under a *de novo* or any other standard, when
24 neither party objects to those findings.”); *United States v. Reyna-Tapia*, 328 F.3d 1114,
25 1121 (9th Cir. 2003) (“[T]he district judge must review the magistrate judge’s findings and
26 recommendations de novo if objection is made, but not otherwise.”). Thus, district judges
27 need not review an objection to an R&R that is general and non-specific. *See, e.g., Warling*
28 *v. Ryan*, 2013 WL 5276367, *2 (D. Ariz. 2013) (“Because de novo review of an entire R

1 & R would defeat the efficiencies intended by Congress, a general objection ‘has the same
 2 effect as would a failure to object.’”) (citations omitted); *Haley v. Stewart*, 2006 WL
 3 1980649, *2 (D. Ariz. 2006) (“[G]eneral objections to an R & R are tantamount to no
 4 objection at all.”).

5 ANALYSIS

6 It is unnecessary to resolve most of Petitioner’s objections because they address
 7 factual issues that are unrelated to the R&R’s statute-of-limitations analysis. (*See, e.g.*,
 8 Doc. 13 at 1 [“I (Petitioner) was stopped and arrested in a vehicle where a 15 year old and
 9 a 16 year old were found also in the vehicle. ‘I object’ to section I. of the Report and
 10 Recommendation on grounds of heresy [sic], due to the Petitioner seeking relief from the
 11 accusations of being arrested from a vehicle. The state was not a crime scene witness but
 12 only heard of the facts surrounding the crime scene.”].) At any rate, as to those objections,
 13 the Court has conducted the required *de novo* review of the R&R and adopts the objected-
 14 to portions. *Ramos*, 65 F.4th at 433.

15 As for the R&R’s statute-of-limitations analysis, Petitioner argues that “the state
 16 proceedings ended March 16, 2022 when state courts dismissed the motion for rehearing.
 17 Statutory tolling should have begun on March 16, 2022 or in good faith efforts, latitude for
 18 prisoner filings by U.S. mail should have been given due to third party mailing procedures
 19 of ADCRR which are well known by the courts.” (Doc. 13 at 2-3.) Petitioner further
 20 argues that “if Petitioner stated in PCR that it was sent February 09, 2022, how then is
 21 Petitioner’s Petition untimely[?] If Petitioner is given 30 days to seek review it is indeed
 22 workdays of the courts not weekends instead. Due to this fact when courts dismissed the
 23 PCR January 12, 2022, the 30 days to seek review ended February 23, 2022 . . . [so] the 1
 24 year tolling should have began 02/23/2022.” (*Id.* at 3.) Put another way, Petitioner argues
 25 that “[t]he request for review was not untimely if you do not include days the courts [are]
 26 closed by law.” (*Id.*)

27 Respondents respond in relevant part as follows: “[T]he R&R correctly found that
 28 the PCR proceeding remained pending until the time expired for Dixon to seek review of

1 the trial court's dismissal of the proceeding, and that the untimely motion for
2 reconsideration or rehearing did not extend the tolling (unlike Dixon claims). Dixon had
3 until February 14, 2022, to petition for review because the trial court's order dismissing
4 the PCR proceeding was entered on January 14, 2022, and Dixon had 30 days from the
5 entry date of the order to petition for review. That means the one-year limitations period
6 would have begun the next day on February 15, 2022, and elapsed on February 15, 2023.
7 Dixon, however, filed his habeas petition a day late on February 16, 2023. Hence, the R&R
8 is correct that the habeas petition is untimely. Dixon has not shown otherwise." (Doc. 14
9 at 5-6.)

10 The Court agrees with Respondents and overrules Petitioner's objections.
11 Regardless of whether the order dismissing Petitioner's PCR petition was entered on
12 January 12, 2022 (as the R&R states) or January 14, 2022 (as Respondents correctly note),
13 Petitioner's motion for rehearing (which was mailed on February 9, 2022) was filed outside
14 the relevant 15-day window and therefore did not extend the statutory tolling period.
15 Accordingly, the period of statutory tolling extended 30 days from the entry of the order
16 dismissing the PCR petition (because, under Arizona law, there is a 30-day deadline for
17 filing a petition for review). Although Petitioner asserts without citation to legal authority
18 that this 30-day period excludes holidays and weekends, Petitioner is incorrect.
19 Accordingly, the 30-day period (and with it, the period of statutory tolling) expired no later
20 than Monday, February 14, 2022; AEPDA's one-year limitations period began running no
21 later than the following day, Tuesday, February 15, 2022; and Petitioner's initiation of this
22 action no earlier than Thursday, February 16, 2023 came at least one day too late. This
23 may be a harsh result, but it is the result that AEPDA requires. *See, e.g., United States v.*
24 *Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000) ("Marcello and Zizzo's petition was filed a
25 day late, and Judge Plunkett properly dismissed it as untimely. Foreclosing litigants from
26 bringing their claim because they missed the filing deadline by one day may seem harsh,
27 but courts have to draw lines somewhere . . ."); *Lattimore v. Dubois*, 311 F.3d 46, 53-54
28 (1st Cir. 2002) ("Lattimore's § 2254 petition was docketed on April 28, 1997, four days


1 after the one-year grace period expired. If Lattimore is given the benefit of the prisoner
2 mailbox rule, and his petition were deemed to be filed on April 25, 1997, the date it was
3 allegedly deposited in the prison mail system, his petition was still one day late and hence
4 barred.”); *Lookingbill v. Cockrell*, 293 F.3d 256, 265 (5th Cir. 2002) (“We have
5 consistently denied tolling even where the petition was only a few days late.”).

6 Accordingly,

7 **IT IS ORDERED** that:

- 8 1. Petitioner’s objections to the R&R (Doc. 13) are **overruled**.
- 9 2. The R&R (Doc. 12) is **accepted**.
- 10 3. The petition (Doc. 1) is **dismissed with prejudice**.
- 11 4. A certificate of appealability and leave to proceed *in forma pauperis* on
12 appeal are **denied** because the denial of the petition is justified by a plain procedural bar and
13 jurists of reason would not find the procedural ruling debatable.
- 14 5. The Clerk shall enter judgment accordingly and terminate this action.

15 Dated this 31st day of August, 2023.

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20 Dominic W. Lanza
21 United States District Judge
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